

Remarks

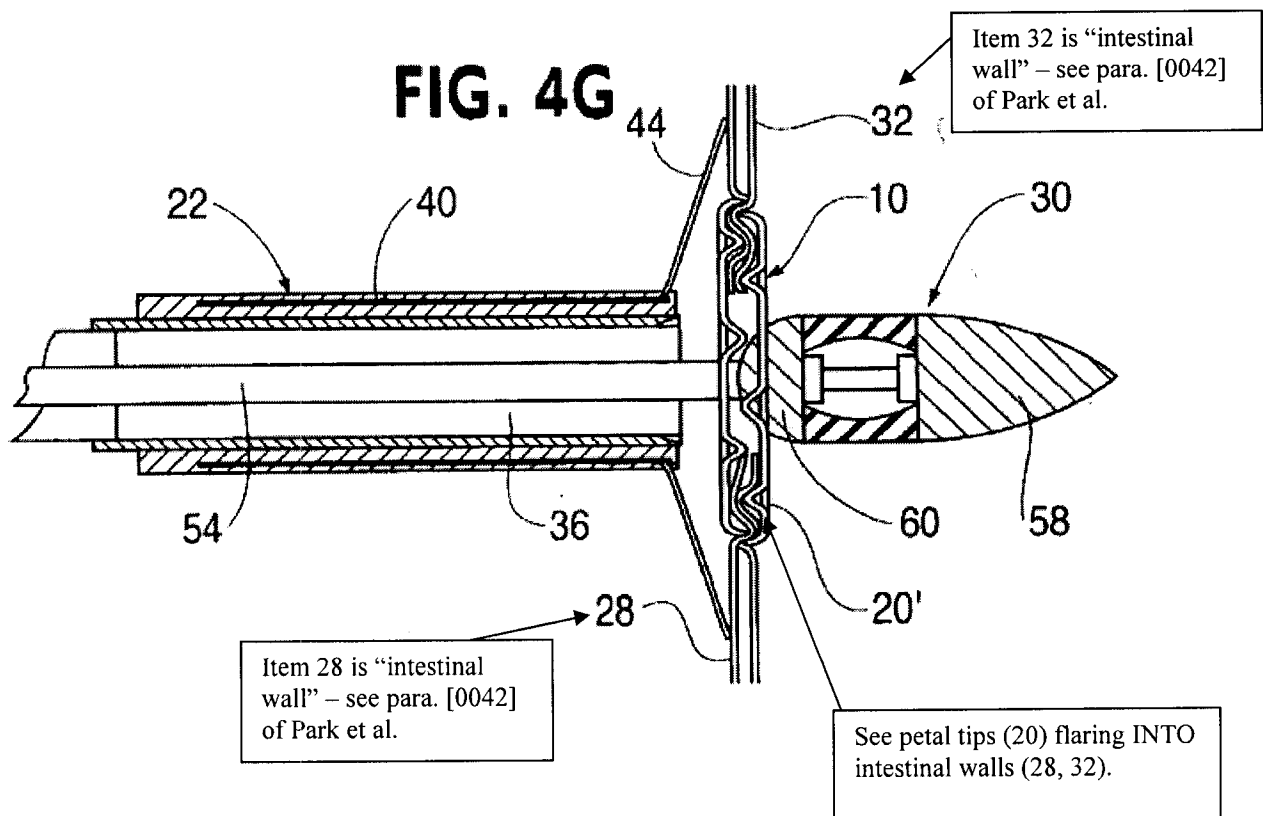
The claims were amended in accordance with the amendments above. The amendments to the claims are being made merely to clarify the invention. All of the amendments are fully supported by the specification, claims, and figures as originally filed. No new matter is believed or intended to be involved.

§103 Rejection

In the Office Action dated 12/10/2008, claims 10, 19, 23-25, and 30 were rejected under 35 U.S.C. §103(a) as being obvious over Park et al. (U.S. 2003/0120292) in view of Peterson et al. (U.S. 6,673,084). Under MPEP 2143.03, in order to establish a *prima facie* case of obviousness, the Office must give due consideration to all of the limitations of a claim. The Office must also sufficiently establish a motivation to combine or modify the teachings of the prior art in order to reach a claimed invention in accordance with MPEP 2143.01. Obviousness rejections “cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1395-97 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). For at least the reasons set forth below, Applicant respectfully submits that the combined art of record fails to render any of the present claims obvious.

Applicant submits that the art of record fails to teach or suggest all of the limitations recited in each independent claim in accordance with MPEP 2143.03. For instance, Applicant notes that amended independent claim 10 recites “each petal comprises a petal tip flaring directionally outward away from the tissue walls when the anastomotic device is in the actuated position.” Amended claim 10 also recites “the woven tube comprises two strands, each strand of the two strands having unattached ends.” In addition, amended claim 10 recites “the unattached ends are flared in the same direction as the petal tips.” Not a single one of these limitations, among others recited in amended claim 10, are taught nor suggested by the combined art of record.

For instance, the Office has cited Park et al. as allegedly teaching petal tips that flare away from the tissue walls when the anastomotic device is in the actuated position, with reference to FIG. 4G of Park. However, a careful review of Park et al. reveals that FIG. 4G actually teaches petal tips flaring into the tissue walls, which cannot be credibly read as teaching petal tips flaring away from tissue walls as recited in claim 10. For reference, Applicant provides an annotated version of Park et al.'s FIG. 4G below:



Applicant further notes that this significant claimed difference over the Park et al. device is not a mere matter of design choice. See, e.g., paragraphs [0071] through [0079] of Applicant's original specification, discussing the significance of differences between flared-in and flared-

away petals. Thus, contrary to the Office's assertion, Park et al. cannot be reasonably said to teach "each petal comprises a petal tip flaring directionally outward away from the tissue walls when the anastomotic device is in the actuated position" as recited in amended claim 10, since Park et al. teaches the exact opposite. To the extent that Peterson et al. teaches anything being flared away from a tissue wall, such structures of Peterson et al. cannot be reasonably read as petal tips as recited in amended claim 10.

With respect to the limitation in amended claim 10 reciting "the woven tube comprises two strands, each strand of the two strands having unattached ends," Applicant notes the Office's purported observation it is essentially *per se* obvious to break a single continuous strand (Park et al.) into at least one strand having unattached ends; with the further purported observation by the Office that "the device of Park performs equally as well as the current application." See Office Action dated 12/10/2008 at p. 3. To the extent that the Office has test data or other evidence supporting this factual assertion about the relative performance of the device in Park et al. with the device recited in claim 10, Applicant requests that the Office provide Applicant with a copy of such data or evidence so that Applicant will have a full and fair opportunity to respond. Otherwise, Applicant objects to the Office making such a sweeping factual assertion without any evidence whatsoever to support such an assertion. Applicant further submits that the performance or efficacy of medical devices is not the type of factual information that the Office can properly take Official Notice of. To the extent that the Office is attempting to take Official Notice of the relative performance of the claimed device and the Park et al. device, Applicant notes that the Office has fallen far short of its burden under MPEP 2144.03. In any event, Applicant has already described the significance of using more than one wire with unattached ends as opposed to a single wire with no unattached ends. See, e.g., paragraphs [0064] through [0066] of Applicant's original specification. Of course, Peterson et al. also fails to teach or suggest "the woven tube comprises two strands, each strand of the two strands having unattached ends" as recited in amended claim 10, even with Peterson et al. being combined with Park et al.

With respect to the limitation in amended claim 10 reciting "the unattached ends are flared in the same direction as the petal tips," Applicant has already noted how Park et al. fails to teach unattached ends. Park et al. therefore simply cannot be read to teach such unattached ends being flared in the same direction as petal tips. To the extent that Peterson et al. teaches either

unattached ends or petal tips, which Applicant does not admit, Peterson et al. fails to teach or suggest such components being flared in the same direction as recited in amended claim 10, even with Peterson et al. being combined with Park et al.

For at least the foregoing reasons, Applicant submits that the combined art of record fails to teach or suggest all of the limitations of amended claim 10 in accordance with MPEP 2143.03. Accordingly, Applicant respectfully submits that the combined art of record fails to render present claim 10 obvious in accordance with MPEP 2143, and respectfully requests that the rejection be withdrawn.

Conclusion

While several distinctions have been noted over the art of record, Applicant notes that there are several other limitations recited in the present claims which are neither taught nor suggested by the art of record. Applicant expressly reserves all rights and arguments with respect to distinctions not explicitly noted herein. In addition, to the extent that the amendments constitute a narrowing of the claims, such narrowing of the claims should not be construed as an admission as to the merits of the prior rejections. Indeed, Applicant traverses the rejections and preserves all rights and arguments. To the extent that any particular statement or argument by the Office in the pending Office Action has not been explicitly addressed herein, the same should not be construed as an acquiescence or admission by the Applicant that such statements or arguments by the Office are accurate or proper.

Based on the foregoing, all pending claims are in a condition for allowance. Accordingly, Applicant respectfully requests reconsideration and an early notice of allowance. Should the Examiner wish to discuss the amendments or arguments made herein, Applicant invites the Examiner to contact the undersigned at (513) 369-4811 or via e-mail at aulmer@fbtlaw.com.

The Commissioner for Patents is hereby authorized to charge any deficiency, including any fees required for an extension of time not already paid for or any other required fees not already paid for, or to credit any overpayment of fees, to Frost Brown Todd LLC Deposit Account No. 06-2226.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'A. B. Ulmer', written over a horizontal line.

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